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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5357

In Re: Estate of
Herman Blumreich, Deceased:
HERMAN CALDWELL,
Appellant,

- v -

HELEN KAQUATOSH, Personal
Representative of the Estate of
Herman Blumreich, Deceased, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO DISMISS

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Appellees, pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein on the grounds that the question sought to be reviewed has been settled by prior decisions of the United States Supreme Court which were rendered prior to this appeal being taken.

STATEMENT OF FACTS

Appellant Herman Caldwell is the illegitimate son of Delores Caldwell. Delores Caldwell lived with decedent Herman Blumreich for a period of time before Blumreich died on January 9, 1974, the victim of a car accident in which an automobile operated by Delores Caldwell struck and killed Blumreich as a pedestrian. Blumreich died intestate leaving an estate of approximately $17,000.00. He left two sisters, one brother and two minor nieces, Rachel Powless and Josephine Powless, as heirs at law. The appellant was born on March 31, 1974.

Shortly after Blumreich's death, the defendant, Helen Kaquatosh, a sister of Blumreich, filed a Petition for Letters of Administration and Determination of Heirship in the County Court for Shawano-Menominee County, Menominee County Division, of the State of Wisconsin. That Court entered an Order appointing attorney John C. Black as Guardian ad Litem for the minor nieces. During the pendency of those proceedings, appellant filed a petition through his Guardian ad Litem alleging himself to be the sole surving child of Blumreich and, as such, the sole heir of his estate. At the hearing on said petition, an offer of proof was made by the appellant through his Guardian ad Litem alleging that the decedent admitted to witnesses that he was the father of the child being carried by Delores Caldwell. That offer of proof was objected to and the objection was sustained by the trial court on the grounds that the proof offered was not relevant in view of Wisconsin Statutes Section 852.05(1). That statute provides that there are three ways that an illegitimate child can be adjudged an heir of a deceased person: (1) if the deceased person had been adjudicated to be the father under a paternity proceeding brought by the District Attorney; (2) if the decedent admitted in open court that he was the father; or (3) if the decedent acknowledged himself to be the

father of the child in a writing signed by him. The appellant offered no proof in conformance with the statute. On November 21, 1975, the County Court entered an Order denying appellant's petition. The appellant filed a notice of appeal from that order with the Wisconsin Supreme Court.

Soon thereafter, appellant commenced an action for declaratory relief asking that his paternity be adjudicated. Motions for dismissal were heard and granted. The appellant then filed a notice of appeal from that order. Both appeals were consolidated for a decision by the Wisconsin Supreme Court.

On June 30, 1978, the Wisconsin Supreme Court handed down its opinion sustaining Wisconsin Statutes Section 852.05(1) against all constitutional challenges.

QUESTION PRESENTED

Does Wisconsin Statutes Section 852.05(1) deny posthumous illegitimate children equal protection or due process of law?

ARGUMENT

In its opinion, the Wisconsin Supreme Court considered this Court's long line of decisions beginning with *Levy v. Louisiana*, 391 U.S. 68 (1968) and last ending with the recent decision of *Trimble v. Gordon*, 430 U.S. 762 (1977). Citing *Trimble*, the Wisconsin Supreme Court stated (A-Ap. A-11-A-12):

> "Applying these principles to the instant case, we conclude that sec. 852.05(1), Stats., constitutes a 'carefully tuned' statute sensitive to the conflicting con-

siderations emphasized in *Trimble, supra.* There is no evidence that this statute reflects an impermissible effort to influence the conduct of parents by imposing sanctions on their illegitimate children. Indeed, the statutory provisions do not distinguish between legitimates and illegitimates so much as they distinguish among various categories of illegitimates, and they specifically allow proof of paternity by either of the two methods identified in *Trimble, supra,* as accurate and reliable: prior adjudication and formal acknowledgment.

We believe the exclusion of other forms of posthumous proof of paternity represents a reasonable effort '. . . to eliminate imprecise and unduly burdensome methods of establishing paternity.' *Trimble v. Gordon, supra,* at 772, *fn.* 14. It has been said that the accusation of paternity is easy to make but difficult to defend against. *See, e.g.: In re Commissioner of Social Services,* 70 Misc.2d 581, 333 N.Y.S.2d 621, 623 (1972). To permit paternity to be established after the death of the putative father, on the basis of his alleged informal, verbal statements would be to place his estate at an unreasonable disadvantage in defending against spurious claims. The decedent would be unavailable to assert defenses or to assist in the cross-examination of his accusers. Information about his blood, which might conclusively eliminate him as the father, might not be available to his estate. His

death thus undermines the reliability of the fact-finding process, and it is not unreasonable to require that a posthumous claim of paternity be supported by the types of documented evidence approved under sec. 852.05(1), Stats.

In addition, the statutory methods of proof avoid the extended uncertainty which would otherwise plague estate proceedings and wrongful death actions. It is apparently the petitioner's position that paternity may be established on the basis of undocumented evidence adduced at any time during the applicable period of limitations. [5] Such an approach would produce

[5] An action for wrongful death must generally be brought within three years after the wrongful act, neglect or default. Sec. 893.205(2), Stats. However, sec. 893.33(1) tolls statutes of limitations for persons under the legal disability of infancy and permits them to bring actions within one year after they reach the age of majority. Authorities are divided as to whether such a general savings provision is applicable to a statute of limitations for wrongful death actions, *see:* Annot. 132 A.L.R. 292, sec. III, pp. 317-320 (1941), and 22 Am. Jur. 2d, *Death,* sec. 45, pp. 639, 640, and it is unnecessary to resolve that question here. At a minimum, the approach proposed by the petitioner would allow him to prove his undocumented paternity at any time within three years after the alleged wrongful act.

intolerable confusion. Potential heirs and claimants could not be identified with confidence until after the period of limitations had elapsed. The lurking possibility that an unknown putative child would come forward at some future time would frustrate the orderly settlement of estates and resolution of wrongful death claims. By requiring that paternity be evidenced in a recorded form during the father's life, sec. 852.05(1), Stats., reduces the likelihood that an unexpected claimant will appear years in the future. The statute thus serves the state's substantial interest in providing for the prompt and definitive determination of the valid ownership of property left by decedents, and such statutes are entitled to a degree of judicial deference. *Trimble v. Gordon, supra,* at 767, 768, *fn.* 12.

Proof of paternity by posthumous secondhand testimony would be imprecise, unreliable and susceptible to fraudulent claims, and would inject intolerable uncertainty into estate proceedings and wrongful death actions. Because such posthumous proof would compromise the valid interests of the state, it is not unreasonable to require that paternity be adjudicated, or acknowledged in open court or in writing by the putative father."

This Court in *Mathews v. Lucas*, 427 U.S. 495 (1976), stated that Congress could adopt laws that discriminate against certain statutory classes of persons in order to serve administrative convenience. Such discrimination

would be permissible so long as the law was not arbitrary in its classification. *Lucas* dealt with illegitimate children who were held to a strict burden of establishing dependency. The Wisconsin Supreme Court noted that the dependency requirements upheld in *Lucas* were practically identical to the paternity requirements of Wisconsin Statutes Section 852.05(1). The Wisconsin Supreme Court further stated (A-Ap. A-15-A-16):

> The requirements of sec. 852.05(1), Stats., constitute similar presumptions in aid of administrative functions; by requiring that paternity be shown from relatively readily documented facts, they safeguard the accuracy, integrity and finality of intestate succession. Like the statutory classifications upheld in *Mathews v. Lucas, supra,* sec. 852.05(1) marks a constitutionally permissible 'middle ground between the extremes of complete exclusion and case-by-case determination of paternity.' *Trimble v. Gordon, supra,* at 771.
>
> The instant petitioner further argues that sec. 852.05(1), Stats., effectively 'creates an insurmountable barrier' to inheiritance or commencement of a wrongful death action by an illegitimate born after the death of the putative father. Amicus curiae Wisconsin Judicare joins in this argument, and contends that sec. 852.05 (1) denies an after-born illegitimate due process of law because the child has no opportunity to establish his paternity. This

'insurmountable barrier' argument is a formulation of the much-criticized 'irrebuttable presumption doctrine.'[6]

In *Trimble v. Gordon, supra,* the Supreme Court eschewed this approach. Despite the fact that such an analysis had been employed in several previous opinions, the court concluded that 'focus on the presence or absence of an insurmountable barrier is somewhat of an analytical anomaly.' *Trimble v. Gordon, supra,* at 773. The essential inquiry, instead, is a dual one, which gives due consideration to both the legitimate governmental interests promoted by a classification and the personal rights which may be endangered thereby. *Mathews v. Lucas, supra,* at 504.

We believe the classifications of sec. 852.05(1), Stats., are equally constitutional under either this approach or the questionable 'insurmountable barrier' approach. In *Labine v. Vincent,* 401 U.S. 532 (1971), the Supreme Court rejected an 'insurmountable barrier' challenge to Louisi-

[6] *See, e.g.:* Gunther, *Individual Rights in Constitutional Law* (2d ed. 1976), at 486-493; *Note, Irrebuttable Presumptions: An Illusory Analysis,* 27 Stan. L.Rev. 449 (1975); *Note, The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 Harv. L.Rev. 1534 (1974).

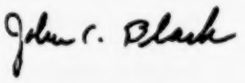
ana inheritance statutes. '. . . There is not the slightest suggestion in this case that Louisiana has barred this illegitimate from inheriting from her father, . . .' the Court said, pointing out that a father could leave property to his illegitimate child in any of three ways: by executing a will, by marrying the child's mother, or by stating in his acknowledgment of paternity a desire to legitimate the child. *Labine v. Vincent, supra,* at 539.

Sec. 852.05(1), Stats., similarly prescribes alternative methods by which an illegitimate may establish a right to inherit from his father. There is no question that he may inherit if the father executes a will naming him a beneficiary. If the father dies intestate, the child may prove paternity by showing that his parents intermarried, that his father acknowledged paternity in open court or in a signed writing, or that an adjudication of paternity was made during the father's lifetime. These alternative methods of proof are more varied, and certainly no more onerous, than those approved in *Labine, supra,* and therefore cannot be said to deny the petitioner due process of law."

CONCLUSION

For all the foregoing reasons, appellees move that this appeal be dismissed.

Respectfully submitted,



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